IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

TYRONE DORMAN **Petitioner,** **v.** **UNITED STATES OF AMERICA,** **Respondent.**	**CRIMINAL ACTION NO. 04-460** **CIVIL ACTION NO. 06-4042**

MEMORANDUM AND ORDER

Katz, S.J. **December 21, 2006**

Petitioner has filed a *pro se* Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody. He argues that his counsel was ineffective for failing to seek a departure under U.S.S.G. § 5G1.3 so that he could receive credit for the time he served on an undischarged state sentence. Now before the court is the Government's Motion to Dismiss Petition Under 28 U.S.C. § 2255, which seeks to enforce the waiver of the right to appeal or collaterally attack the sentence in Petitioner's plea agreement. For the reasons stated below the court will grant the Government's Motion.

I. FACTS

On March 25, 2004, while Petitioner was on pre-release status from a 24-48 month state sentence, Philadelphia Police officers arrested Petitioner on charges

that became the instant federal offense. As such, Petitioner was sent back to SCI Graterford on a Pennsylvania Department of Corrections ("PA DOC") pre-release violation. Petitioner was indicted on August 10, 2004 in federal court for being a felon in possession of a firearm under 18 U.S.C. § 922(g)(1), and on September 16, 2004 he was transferred to FDC Philadelphia on writ from the PA DOC.

Rather than face trial, Petitioner chose to enter into a plea agreement pursuant to Federal Rule of Criminal Procedure 11(c)(1)(C),[1] which contained a binding sentence recommendation of 90 months. In the agreement, Petitioner agreed that, with very limited exceptions, he would neither appeal nor present any collateral challenge to his conviction or sentence. Specifically, the appellate waiver stated:

> In exchange for the undertakings made by the government in entering this plea agreement, the defendant voluntarily and expressly waives all rights to appeal or collaterally attack the defendant's conviction, sentence, or any other right to appeal or collaterally attack the defendant's conviction, sentence, or any other matter relating to the prosecution, whether such a right to appeal or collateral

[1]Under 11(c)(1)(C) the parties "agree that a specific sentence or sentencing range is the appropriate disposition of the case, or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply (such a recommendation or request binds the court once the court accepts the plea agreement)." FED. R. CRIM. P. 11(c)(1)(C); see also United States v. Arrieta, 436 F.3d 1246, 1251 (10th Cir. 2006) (holding that a district court does not have authority to depart from an agreed upon sentence entered into pursuant to Federal Rule of Criminal Procedure 11(c)(1)(C)); United States v. Bernard, 373 F.3d 339, 344 (3d Cir. 2004) (noting that once a plea agreement with a sentencing stipulation is reached between the parties and accepted by the Court, it must be enforced at sentencing). "[N]othing in *Booker* undermines the validity of sentences imposed under Rule 11(c)(1)(C)." United States v. Silva, 413 F.3d 1283, 1284 (10th Cir. 2005); see also United States v. Cieslowski, 410 F.3d 353, 364-65 (7th Cir. 2005).

> attack arises under 18 U.S.C. § 3742, 28 U.S.C. § 1291, 28 U.S.C. § 2255, or any other provision of law.

After conducting a thorough plea colloquy, the court accepted Petitioner's plea on May 31, 2005. On September 7, 2005, the court imposed a sentence of 90 months imprisonment pursuant to the binding sentence recommendation in the plea agreement. Petitioner was subsequently transferred back to SCI Grateford to serve the remainder of his state sentence, which he completed on March 9, 2006. Following the completion of his state sentence, Petitioner was returned to Federal custody where he began serving his federal sentence.

II. DISCUSSION

The Government argues Petitioner's habeas motion should be dismissed based on Petitioner's waiver of his right to collaterally attack his sentence. The court agrees. The court further notes that Petitioner's habeas corpus petition has no merit and should be dismissed regardless of whether Petitioner waived his right to collaterally attack his sentence.

A. Waiver

In United States v. Khattak, the Court of Appeals for the Third Circuit held that waivers of appeals are enforceable if entered into knowingly and voluntarily, unless they work a miscarriage of justice. United States v. Khattak, 273 F.3d 557, 558 (3d Cir. 2001). Although decided in the context of a waiver of the right to

direct appeals, the ruling logically applies to a defendant's knowing waiver of the right to present a collateral attack. See, e.g., United States v. Wilkes, 20 F.3d 651, 653 (5th Cir. 1994) (holding that there is no principled means of distinguishing a waiver of the right to collaterally attack a sentence from the waiver of a right to appeal).

1. **Knowing and Voluntary Waiver**

The trial judge's plea colloquy under FED. R. CRIM. P. 11 is critical in determining whether Petitioner's waiver of appellate and collateral attack rights was knowing and voluntary. See Khattak, 273 F.3d at 563. Here, the record demonstrates that Petitioner's waiver of appellate and collateral attack rights was knowing and voluntary. Petitioner signed a written plea agreement that fully detailed his waiver of the right to collaterally attack his sentence. At the plea hearing, the court engaged in an extensive colloquy with Petitioner pursuant to FED. R. CRIM. P. 11 to ensure he understood the consequences of this plea agreement. In so doing, the court asked Petitioner "Do you understand by pleading guilty, you are giving up your right to appeal from any conviction from any conviction after trial and the only appeal from a guilty plea is if I imposed an illegal sentence or if there are any errors in this proceeding?" Transcript p. 16. Petitioner responded that he understood the limitations that the Guilty Plea

Agreement placed on his right to appeal and collaterally attack his sentence. Id. Thus, the court finds that the Petitioner understood his waiver of the right to collaterally attack his sentence.

2. Miscarriage of Justice

Enforcing the waiver will not result in a miscarriage of justice. Although an error amounting to a miscarriage of justice may invalidate the waiver, 273 F.3d at 562, no error was committed here, and as such, there can be no miscarriage of justice.

Petitioner argues that his counsel was ineffective for failing to request a departure under U.S.S.G. 5G1.3. For Petitioner's claim for ineffective assistance of counsel to succeed, he must demonstrate that: 1) his counsel's performance was deficient and 2) the deficient performance prejudiced the defense. Strickland v. Washington 466 U.S. 668, 687, 104 S.Ct. 2052, 2064 (1984).

Petitioner is unable to demonstrate that counsel's decision was deficient in failing to seek a departure under U.S.S.G. 5G1.3. In establishing a deficient performance under the first prong, "[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms." Id. at 688. In this case, Defendant's counsel was not permitted to seek a departure under U.S.S.G. 5G1.3 as the parties stipulated in the plea agreement that neither party

would "seek [] an upward or downward departure under the Sentencing Guidelines." Plea Agreement p. 3. See United States v. Astacio,14 F. Supp. 2d 816, 819-20 (E.D.Va.1998) (holding that defense counsel was not ineffective for failing to seek a Rule 35 departure because the plea agreement stated that such a motion could only be brought by the government); Stevenson v. United States, Civ. A. No. 04-60094 2005 WL 2033496, *2-3 (E.D. Mich. Aug. 22, 2005) (holding that counsel's performance was not deficient for failing to move for a departure based on the defendant's extraordinary physical condition, because moving for that departure would have vitiated the plea agreement); Gonzalez v. United States, Civ. A. 96-8046, 1998 WL 19999, *1 (S.D.N.Y. Jan. 20, 1998) (holding that Petitioner was not denied effective assistance of counsel because the plea agreement expressly bars either party from seeking a departure).

Had Defense counsel sought a departure, he would have vitiated the plea agreement and forfeited the significant benefits for Petitioner. Instead, by complying with the plea agreement and its waiver of the right to move for a downward departure, Petitioner's attorney guaranteed his client a sentence of 90 months imprisonment, which was significantly below the guideline range in this case. Defense counsel's strategic decision to comply with the terms of the

agreement, as well as his advice to accept the plea agreement,[2] was well within the range of reasonable professional assistance. Therefore, Defense counsel performance was not deficient.

Moreover, U.S.S.G. § 5G1.3 provides for the result opposite of that desired by Petitioner. Specifically, U.S.S.G, § 5G1.3(a) states that "[i]f the instant offense was committed while the Petitioner was serving a term of imprisonment (including work release, furlough, or escape status) or after sentencing for, but before commencing service of, such term of imprisonment, the sentence for the instant offense shall be imposed to run consecutively to the undischarged term of imprisonment." Here, Petitioner was on pre-release status to the Kintock Group Community, and therefore technically still an inmate of PA DOC serving a term of imprisonment when he was rearrested. See United States v. Rogers, 897 F.2d 134, 137 (4th Cir.1990) (applying U.S.S.G. § 5G1.3(a) in case where defendant committed a crime while on pre-release status). Thus, U.S.S.G, § 5G1.3 advises that Petitioner's sentence for the federal charge shall run consecutively to the undischarged term of state imprisonment. See United States v. Swan, 275 F.3d 272, 280 (3d Cir. 2002) (noting that § 5G1.3(a) mandates a consecutive sentence

[2]Petitioner's Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, Or Correct Sentence by a Person in Federal Custody does not allege that Petitioner's attorney was ineffective in negotiating the plea agreement.

in certain circumstances).[3] Although the guidelines are no longer mandatory after *Booker*, defense counsel's invocation of U.S.S.G. 5G1.3 would not have helped Petitioner reduce the amount of time on his federal sentence. Under the facts of this case, it is entirely appropriate that Defendant's undischarged state sentence run consecutive to his federal sentence.

In sum, defense counsel's strategic decision not to violate the plea agreement by invoking a sentencing guideline provision that provides that Petitioner serve a consecutive sentence, the result opposite of that desired by Petitioner, can hardly be considered deficient performance. Therefore, upholding the waiver will not result in a miscarriage of justice.

B. Merits

For the reasons described above, Plaintiff's Motion Under 28 U.S.C. § 2255 To Vacate, Set Aside, Or Correct Sentence By A Person In Federal Custody lacks merit and should be dismissed even in the absence of the waiver.

An appropriate Order follows:

[3]United States v. King, 454 F.3d 187, 196 (3d Cir. 2006)(holding that the Court Appeals for the Third Circuit's pre- *Booker* caselaw regarding departures under the guidelines continues to have advisory force)

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ORDER

AND NOW, this 21st day of December, 2006, upon consideration of the Government's Motion to Dismiss Petition Under 28 U.S.C. § 2255, and Petitioner's response thereto, it is hereby **ORDERED** that:

1. Government's Motion is **GRANTED;**

2. Petitioner's Habeas Corpus Motion Under 28 U.S.C. § 2255 is **DENIED WITH PREJUDICE**; and

3. A certificate of appealability will not issue, because Petitioner has not made a substantial showing of the denial of a constitutional right, as required by 28 U.S.C. § 2253(c)(2).

BY THE COURT:
/s/Marvin Katz

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MARVIN KATZ, S.J.